Supreme Court, U.S.
FILED
JUN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1582

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1987

FRANK BORING FITZGERALD, Appellant,

V.

STATE OF MONTANA; Department of Family Services, EUGENE HUNTINGTON, Director,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

SUPPLEMENTAL BRIEF

FRANK BORING FITZGERALD,
3000 Hallowell Lane
Billings, Mt 59101
406-259-5866
Appellant, Pro Se

QUESTION PRESENTED

Question raised by Appellees: Whether Appellant has exhausted his state remedies available to him. New information.

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STATE OF MONTANA; Department of Family Services, EUGENE HUNTINGTON, Director, Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MONTANA

SUPPLEMENTAL BRIEF

Pursuant to Rule 16.6, Appellant, FRANK BORING FITZGERALD, Pro Se, files his SUPPLEMENTAL BRIEF calling attention of this Court to intervening matters, entered in the Appendices, not available at the time of Appellant's last filing.

QUESTION RAISED

Appellees raised the question in their MOTION TO DISMISS, at page 6, "...nor shown that no state remedies are available to him."

That question was answered in part in Appellant's BRIEF OPPOSING MOTION TO DISMISS, at page 19 in parentheses, "(Appellant currently seeks a state Writ of Mandate...)"

That action, PETITION FOR A WRIT OF MANDATE, DV 88-726(7), has now been both filed, App. 284-312, and denied, App. 313-316, in Montana's 13th Judicial District Court. Both the filing and denial are new and significant developments intervening since the last filing in this Court of Appellant's papers.

ARGUMENT

This case is an ongoing one for the past 9 years. The QUESTION above raised and addressed, is tied to Questions raised in Appellant's Jurisdictional Statement. Particularly, Questions 3 and 8, which point to the larger question of State's ability to have, unconstitutionally, harmed and continues even now to harm Appellant's parent-child relationship

where his Parental Rights have not been conclusively terminated, thru acts of commission and/or omission by persons acting for and in behalf of the State. That harm was earlier demonstrated by several documents in Appendices G, M, O, P, Q, R, S, T, and now V.

And now the latest insult to injury, the denial of a Writ of Mandate by the state lower court to extract Appellant's child from her abuse and neglect at the hands of the State. Impossible to remedy?

Yes, the State can and does occasionally create conditions, foster-care, in which child abuse and neglect take place. Short of war, there are no easy remedies available to fight the State wrong in the case of sexual assault upon Appellant's child by confessed foster-care father. That is because those in the power structure adhere to the premise, "the State can do no wrong." And now Appellant's child believes that with all her might. Admit-

ting no wrong in the presence of documented wrong, the State continues to insist no wrong has been committed for which anything other than implementing State policy need be effectuated. In other words, "coverup".

The QUESTION must be asked, if the child were similarly sexually assaulted in a non-foster-care family, would the protection of the child be to remove the child and to punish the perpetrator? In Montana, the answer is clearly yes, Appellant having seen it many times in the media.

But because the subject family is a foster-care family, it appears to have blanket immunity! While in foster-care, the law in Montana does not protect the child as much as it protects the State from harm of adverse attention and direction.

When the State is the one doing harm to the child and to the parent-child rela-

tionship, it cannot continue to claim supreme sovereignty. Who is to right the State wrong?

Appellant believes this system of foster-care, secrecy surrounding it and the State's ability to shape events as personnel want to, needs ending and replacement. It starts with a different set of State personnel attitudes, values and direction.

CONCLUSION

Appellant, contrary to argument of Appellees, is exhausting state remedies as each development requires a different approach.

Federal and constitutional questions raised by Appellant are still within this Court's jurisdiction to resolve.

Child abuse and neglect, caused by foster-care, may appear on the surface to be a matter only for state resolution. But effects of the foster-care sexual assault have impacted so badly Appellant's child, and his parent-child relationship, not

terminated, it amounts to termination and adoption. And that means infringement of his Constitutional Rights. It is absent immediate state remedies, without redress of grievances, and, without due process.

PRAYER

Appellant prays this Honorable Court grants his Appeal, or in the Alternative Court One, Petition for a Writ of Certiorari, or, Count Two, Petition for a Writ of Habeas Corpus as presented in Appellant's Jurisdictional Statement modified hereby with new and significant matters herein which are material to this case.

Respectfully submitted,

Dated June 16, 1988

Frank Boring Fitzgerald

Frank Boring Fitzgerald
Appellant, Pro Se
3000 Hallowell Lane
Billings, Mt 59101
406-259-5866

(APPENDICES U, V FOLLOW)

AFFIDAVIT

STATE OF MONTANA)

) SS.

County of Yellowstone)

FRANK BORING FITZGERALD, Appellant, Pro Se, being first duly sworn, hereby deposes and says:

He has personally prepared and read his SUPPLEMENTAL BRIEF, in his Appeal 87-1582.

He certifies, in his judgment, matters raised are well founded and contribute to a better understanding of the case.

Frank Boring Fitzgerald

Frank Boring Fitzgerald

SUBSCRIBED AND SWORN TO before me by FRANK BORING FITZGERALD on this 16th day of June, 1988.

Notary Public in State of Montana

Residing in Billings, Montana

My Commission Expires 5/.../..

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) SS.
County of Yellowstone)

FRANK BORING FITZGERALD, Appellant, Pro Se, being first duly sworn, hereby deposes and says:

He has personally served, via prepaid first class mail, his SUPPLEMENTAL BRIEF in his Appeal 87-1582, on the following persons known to be of interest in this APPEAL.

For Appellees:

HON. MICHAEL T. GREELY, Attorney General
*CLAY R. SMITH, Assistant Attorney General
State of Montana, Justice Building, 215 North Sanders, Helena, MT 59620-1401
406-444-2026.

RANDI M. HOOD, Special Assistant Attorney General, State of Montana, 48 North Last Chance Gulch, Helena, Mt 59601 406-444-5900.

With copy to:

Damon L. Gannett, Guardian Ad Litem, 720 North 30th Street, Billings, Mt 59101-0097 406-245-6338.

And, with copy to:

Ralph L. Herriott, Former Counsel for Appellant, 315 North 24th Street, Billings, Mt 59101. 406-248-7110

* Counsel of Record

Frank Boring Fitzgerald

SUBSCRIBED AND SWORN TO before me by FRANK BORING FITZGERALD on this 16th day of June, 1988.

Notary Public in State of Montana
Residing in Billings, Montana
My Commission Expires 8-1-88

(APPENDICES U, V FOLLOW)

APPENDICES U, and V

U...PETITION FOR A

WRIT OF MANDATE.....App. 284-312

V...ORDER DENYING

WRIT OF MANDATE.....App. 313-316

APPENDIX U (Typed Copy)

Ralph L. Herriott
315 North 24th Street
Billings, Montana 59101
tel. (406) 248-7110
Attorney for Petitioner

MONTANA 13TH JUDICIAL DISTRICT,
YELLOWSTONE COUNTY

FRANK B. FITZGERALD, Petitioner, vs. THE STATE OF MONTANA, acting by and through HAROLD HANSER, the County Attorney in and for Yellowstone County: DEPARTMENT OF FAMILY SERVICES, an agency of the State of Montana; and JOHN DOE I, JOHN DOE II, JOHN DOE III, and JOHN DOE IV, representatives and employees of the Department of Family Services of the State of Montana, and DAMON GANNETT, Guardian ad litem of Margaret Geraldine Moore, a minor child, Respondents	Cause No. 88-726 JUDGE: G.TODD BAUGH

PETITION FOR WRIT OF MANDATE

PETITIONER, FRANK B. FITZGERALD, for cause of action alleges as follows:

I.

These proceedings are instituted pursuant to the provisions of Title 27, Chap-

ter 26, Sections 27-26-101, et. seq., of the Montana Code Annotated for the reasons and upon the ground set forth herein, as well as the reasons set forth in the accompanying affidavits filed herein and upon the further ground that Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, and for cause for his petition the Petitioner alleges as follows:

II.

Petitioner is the natural father of Margaret Geraldine Moore, a minor child of the age of 15 years; Petitioner has never by Court Order, or otherwise been deprived of his rights as the natural father of the said minor child.

III.

The custody of Margaret Geraldine Moore, minor child above-mentioned has in the past been the subject matter of Cause No. DJ-79-188, of this Court and Cause No. 86-538 of the Supreme Court of the State

of Montana. This Court retains jurisdiction over the person of the said minor child and the subject matter of the custody of the said minor child, as appears in said proceedings. Yellowstone County is the domicil of the said minor child.

IV.

In the proceedings set forth above, the custody of the minor child was awarded to the State of Montana; that the Department of Family Services is an agency of the State of Montana enjoined by law to administer the care, custody and control of minor children adjudicated youth in need of care; that the Department of Family Services places children within its jurisdiction in foster homes chosen and administered by the Casey Foundation and the said Casey Foundation has at all times acted as an agent for the State of Montana as regards these proceedings and the custody of the said minor child.

V.

That the Casey Foundation, with the approval and consent of the Department of Family Services placed the said minor child in the foster home of Kenneth and Marilyn Curtis, whose address is 81 Lacota Drive, Missoula, Montana, where, on or about the 19th day of December, 1987, or prior thereto, the said minor child was sexually assaulted by Kenneth Curtis, who has admitted to commission of the said offense.

VI.

That prior to the placement of the minor child in the Curtis home, the said minor child had been placed in a foster home wherein there existed an environment of acute case of alcoholism and where the said minor child was threatened with fire-arms and otherwise abused.

VII.

That heretofore, Damon Gannett has been appointed by this Court as the

Guardian ad litem of the said minor child and was such guardian at the time of the sexual assault set forth herein.

VIII.

That Margaret Geraldine Moore is an abused and neglected child within the meaning of Sections 41-3-101 and 41-3-102, MCA, and the facts constituting the abuse and neglect have been known by all of the Respondents since January, 1988. That the Department of Family Services is required by the provisions of Section 41-3-302, MCA and the guardian ad litem is required by provisions of Section 41-3-303 to take action for the protection of the said minor child, but notwithstanding that the said state agency and guardian ad litem have had actual knowledge of the sexual assault, no action has been taken by either, in spite of the fact that the Petitioner has so requested as is more particularly set forth in the affidavit of Petitioner, which is incorporated herein by this ref-

erence as though fully set forth herein and which also particularly appears in the affidavit of Petitioner's attorney which is incorporated herein by this reference as though fully set forth herein.

IX.

That Harold Hanser is the duly elected qualified and acting county attorney for Yellowstone County and is required by the provisions of Section 41-3-401, MCA for filing petitions regarding the abuse of minor children. That Yellowstone County is the domicil of the said minor child.

X.

That notwithstanding actual knowledge of the Respondents of the sexual assault upon the minor child, as herein alleged, the minor child remains in the foster home where the said sexual assault occurred and no action has been taken to remove the minor child from an environment which is detrimental and injurious to growth and development of the said minor child.

WHEREFORE, the Petitioner prays that this Court issue a Writ of Mandate requiring the Respondents to remove the minor child from her present environment and placing the said minor child in a suitable environment, preferably the home of her natural father, or in the alternative, to appear and show cause at a time and place certain why the Respondents have not done so, and for such other relief as is appropriate in the premises.

Signature: Frank B. Fitzgerald

STATE OF MONTANA)
: ss
County of Yellowstone)

FRANK B. FITZGERALD, sworn upon his oath deposes and says: That the allegations of the within and foregoing Petition are true to the best of his knowledge, information and belief.

Signature: Frank B. Fitzgerald

Subscribed and sworn to before me this 23rd day of May, 1988.

Signature: Ralph L. Herriott

Notary Public for the State of Montana, Residing at Billings, Montana. My Commission expires Oct. 13, 1988.

(NOTARIAL SEAL)

(Typed Copy) {Marked}

A F F I D A V I T 88 726

STATE OF MONTANA)
: ss
County of Yellowstone)

Frank B. Fitzgerald, being of lawful age and first being duly sworn upon his oath deposes and says: That he resides at 3000 Hallowell Lane, Billings, Montana. That he is married and that his wife's name is Velma Fitzgerald and that she resides with the affiant at the address above. That he is the natural father of Margaret Geraldine Moore. That his daughter now resides with Ken and Marilyn Curtis in Missoula, Montana. That the State of Montana now has custody of Margaret Geraldine Moore as a result of a Court Order in cause number DJ-79-188 in the District Court of the 13th Judicial District of the State of Montana in and for the County of Yellowstone.

That in the month of January, 1988, affiant was informed by George Bulatowicz

that affiant's daughter had been sexually assaulted by Ken Curtis, foster father.

Thereafter the affiant made attempts to have his daughter removed from the Curtis Foster Home where she had been placed by the Casey Foundation, an agent of the Department of Family Services of the State of Montana as is set forth in the correspondence from affiant to George Bulatowicz.

That thereafter and on or about the 25th day of February, 1988, the affiant received a letter from the Department of Family Services of the State of Montana.

That a copy of the letter from affiant to the Department of Family Services is attached hereto. That the letter from the Department of Family Services to affiant is attached hereto.

That thereafter the affiant received a letter from his daughter dated February 17, 1988. That affiant believes that the letter written by his daughter is the

result of the influence of the environment in which she is now placed. A copy of said letter is annexed to this affidavit.

Affiant believe that the environment in which his daughter has recently been placed and which has been placed in the past by the Department of Family Services is not conducive to the proper and healthy development of his daughter but rather is detrimental to her best interests.

Signature: Frank B. Fitzgerald

Subscribed and sworn to before me this 23rd day of May, 1988.

Signature: Ralph L. Herriott

Notary Public for the State of Montana, Residing at Billings, Montana. My Commission expires Oct. 13, 1988.

(NOTARIAL SEAL)

(Typed Copy)

[Letter attached to Affidavit]

Frank B. Fitzgerald

3000 Hallowell Lane

Billings, Mt 59101

259-5866

January 24, 1988

George Bulatowicz

Social Worker

Department of Family Services

3021 - 3rd Avenue North

Billings, Mt 59101

Re: In Re: M.G.M., DJ-79-188, 13th Judicial District; In Re: M.G.M., 86-538, Mt.Sup.Ct.; In Re: Fitzgerald v. Department of Family Services, et al., US Supreme Court.

Dear Mr. Bulatowicz:

This letter covers several matters in regards my daughter Margaret Geraldine Moore. Please note the parties listed at the end receiving a copy of this letter.

It is to them some of these matters are addressed altho you should be aware of the implications, for your handling of the case as a social worker.

Please accept my very grateful thanks for first inviting me to your office at 1:30P, January 22, 1988 and then forthrightly telling my wife, Velma, and me, of my daughter's plight at the hands of the foster care father, Ken Curtis. It was stressful news I did not expect. We feel for our child. As I remember it, this is the very first time in nearly 9 years the state has told me anything happened in foster care to Margaret of detriment to her and our parent-child relationship. I have had to learn clandestinely of other harm to Margaret while she was in foster care from extra agency sources to avoid the Attorney General's secrecy rule.

If I understand correctly, Ken Curtis did enter Margaret's bedroom and did touch her breasts on or about December 19, 1987;

and that he did admit to having done this; and that he no longer lives in the Curtis home at 81 Lacota Dr., Missoula; and that there are pending proceedings in Missoula involving the incident. If any proceedings are to take place or have taken place, those records and reports, as they pertain in any regard to Margaret, should likewise be made a part of this Court's file, DJ-79-188. That is because this Court retains jurisdiction over all matters, things and persons in regards this case evidenced by expression number one of the Court Order of September 2, 1986.

Please repeat to us in writing of the above incident and forward to us any information pertaining to Margaret as it becomes available. The Court here must of course be made aware of goings on in Missoula. Since this case is going on appeal to the US Supreme Court as noted above, the Attorney General must also be made aware. And, I want the Montana Su-

preme Court Chief Justice Turnage to personally be made aware of this latest incident. It is new and significant information and pertains to cause 86-538. It implements my pro se filed prayer to Turnage citing the Phillips Notarized Statement, mentioned below. That prayer has not yet been acted upon and is current.

From what you said, Margaret did not want me, her father, to know of the above incident. I do not know her reasons for this. We, of course, as her parents do have the need to know. I do think it important she could and should feel free to tell me, herself, personally, so we can talk if appropriate; that is partly what fathers are for, something she lost to foster care. She should be given encouragement to do this by those in position within the system. We want her to let us know her feelings so as to be of help to her.

Margaret has no reason nor any need to protect Ken Curtis from me. She surely has no reason to protect him as a father figure. Rest assured, there will be no violence from me. I do want to stress, all of the foster care abuse and neglect created by the system these 9 years, fostered by the system upon Margaret while she has been in foster care, I treat as an affront, and a clear danger to her, and to our parent-child relationship. It is the state's manufacturing of historical events detrimental to the best interests of our child. I will attempt to protect the legal parent-child relationship in every way I can.

We as parents are aghast, this was allowed to happen in foster care to our child and to us, for an injury to our child is an injury to us. Ever more so now, the best interests of our child clearly lies first and foremost with us her human family not with parens patriae.

My presumption is Ken Curtis had ulterior motives in his affront to my daughter's person, dignity, pride, self-esteem, and her image of what fathers are all about.

My wife and I love our daughter, want to protect her, give her a good start in life; that is what we are all about but your stinking rotten inhuman system has prevented that love she needs being received by her because of interference by foster care counselling her, such as the Curtis counselling, not to accept our love, only the Curtis kind.

I am proud of my daughter for having the guts to face up to Ken Curtis and finally say "no"; and, to report it.

I want to state for the record, I and my wife regret this incident ever happened. We feel compassion and hurt for our child and we will do everything we can within the law to help her.

However, we disclaim any legal responsibility, otherwise coming under statutory requirement of parental protection of the child, for this or any other incident which has occurred to Margaret while she was in foster care. Under circumstances of foster care, it was impossible for us to have prevented this or any other incident with her in Missoula 300 miles away. As you know, her physical custody, assigned by court order, approved by Montana's Supreme Court, has been in the hands of Casey Foundation's Casey Family Program, the private agency, and in the hands of the Curtises who themselves were not adequately investigated.

My objective for Margaret is to settle her into my family here in Billings as quickly as possible. Either we, and/or sources we pick, will provide her with adequate implementation of whatever she needs, bearing in mind she has had it up to here with "counseling, poking and pry-

ing" by professionals and the so-called counsellors, the Curtises. With us her family she will be able to express herself, where in the Curtis foster care she was not. She will have input with us. Margaret is reported, long before the present incident, to have confided in a friend, she felt she was like, in a "prison" in her situation in Missoula.

As any father would be, I am clearly angry any man would dare to muster such an incident. My anger extends to all those responsible for placing my daughter in such a situation for a second time and for such a long time.

My tolerance for this inhuman system is at an end. I now have to lay it out for system promoters I will accept no more legally sequestered incidents of abuse upon my daughter, her having been previously exposed to abuse by Phillips foster care in the form of alcoholism, gun shot, threatened with a loaded gun, running for

their lives; and, seeing before her eyes, a second foster family disintegrate. I will blow the whistle.

First, I bring to your attention the Phillips "Stipulation" on {his} alcoholism of June 1981; it is of record.

Second, the Phillips "Notarized Statement" is now contained as Appendix G attached to my Jurisdictional Statement filed in US Supreme Court and was included as an exhibit to a plea for a Stay Order to Chief Justice Turnage on September 24, 1987.

Third, because of its implications, I will submit to the US Supreme Court, a supplemental brief containing the essence and meaning of this latest in a series of foster care incidents.

A delay in the US Supreme Court could be asked for pending filing of further pleadings in Montana's Supreme Court in the form of a Petition For a Writ of Re-

view on the basis of this and other new and significant evidence.

For the limited purpose of a delay in the US Supreme Court and a Petition For a Writ of Review at the Montana Supreme Court level, I would hope there would be no opposition from either the Attorney General, the County Attorney, or Guardian Ad Litem.

If a TIA was served upon Ken Curtis, it must be also served together with appropriate documents, upon me as I am still Margaret's legal custodian, parental rights having been preserved in the court order of September 2, 1986, affirmed in 86-538 Mt.Sup.Ct. on August 20, 1987, rehearing denied on September 17, 1987.

By court order of September 2, 1986, Margaret was placed in the Curtis foster care home until she becomes 18. Therefore she can not be transferred at this time to another foster care home without further proceedings to which I am a party.

This is not to say I and my wife want our daughter to remain in the Curtis home or in any other foster care home. To the contrary, we absolutely want her out of that or any other foster care situation all of which I feel is detrimental to Margaret and to our parent-child relationship. My demand is that she be returned to us her rightful family where none of these child abuse incidents could or would ever take place.

We allege, the two foster care home providers, Phillips and Curtis, were not given as much attention as we were given by the system when it came to placement of Margaret. We were treated as adoptive parents instead of family thru use of a false state doctrine which dictated, long before parental rights are conclusively terminated on point of unfitness, foster care is the best interests of the child and foster care is the primary goal not keeping the family together. That is what

this case is all about and system promoters want to preserve their niche at the expense of our normal parent-child relationship.

Because this is the second foster care home abuse of our child to surface, we hereby allege and charge, the Attorney General's denial of parental access to department secret files permitted a coverup of state induced trauma to our child; and, a sufficient and significant doubt is cast upon the Stipulation in this case of August 13, 1986, upon limitations on parental rights and due process the Stipulation represents, and, upon Dr. Richard Agosto's Report, Affidavit, and testimony from the standpoint of limited guidelines of evaluation imposed by Casey upon him to exclude looking at effects of longterm foster care trauma being a detriment and deterrent to our parent-child relationship, failure to adequately take into account our daughter's foster care con-

ditioning, exposure of our child to child abuse and neglect while in foster care, lack of adequate investigation of foster care providers, and other parameters, and the fact his {Dr. Agosto} "bills" were paid for by the Casey Foundation who had physical custody of our child.

Because of the above and much more, we will seek to reopen this case with the intention of obtaining full and uninterfered with custody of our child; by rescission of the court order of September 2, 1986; by court ordered return of Margaret to us her true family. If she needs treatment of any kind or nature, we will get it for her on the condition it is our choice and doctor-client confidentiality will prevail to the extent the doctor has nothing to report to the state under statutory mandatory reporting of incidents of child abuse and neglect; and, such evaluations, counseling, or treatments will

remain confidential only to our family and not to the state or other persons.

Further, the system stands exposed to investigation. We of course would cooperate and seek an independent special prosecutor.

In addition to a state independent investigation, because Federal statutes, USCS Title 42-601 et seq., at several points allegedly have been disregarded, and USCS Title 42-1983 allegedly was violated, I would think the US Attorney would be most pleased to receive a complaint and perhaps call for the Federal Grand Jury to convene on this matter.

Signature: Frank B. Fitzgerald

cc: Clerk of Court, US Supreme Court
Chief Justice Jean Turnage, Mt.Sup.Ct.
Clerk of Court, Mt.Sup.Ct.
US Attorney, Billings, Mt. District
Judge Speare, 13th Judicial District
Director, Court Services, 13th Dist.
Hon. Mike Greely, Attorney General
Harold Hanser, County Attorney
Greg Mullowney, Dep. County Attorney
Damon Gannett, Guardian Ad Litem
Ralph Herriott, Attorney

{Attached next was letter dated February 25, 1988, from DFS Legal Counsel, Randi Hood, which may be found at App. 196-197 in the BRIEF OPPOSING MOTION TO DISMISS.

{Attached next was letter dated February 17, 1988 from MGM addressed to Mr. and Mrs. Frank Boring Fitzgerald and one scribbled addressed to "Dere Velma". Those MGM letters were in an envelope addressed to Frank Boring and Mrs. Velma. Return addressed in the name of Margaret Ann Curtis. These may be found at App. 250-255 in the BRIEF OPPOSING MOTION TO DISMISS.}

(Typed Copy) {Marked}

A F F I D A V I T 88 726

STATE OF MONTANA)
: ss
County of Yellowstone)

Ralph L. Herriott, being of lawful age and being first duly sworn upon his oath, deposes and says:

That he is legal counsel for Frank B. Fitzgerald. That Frank B. Fitzgerald is the natural father of Margaret Moore. That Margaret Moore resides in Missoula, Montana in the home of Ken and Marilyn Curtis, which home and persons has been selected as the foster home for Margaret Moore by the Casey Foundation, which is acting as a{n} agent for the State of Montana by and through the Department of Family Services.

That the affiant was informed by Frank B. Fitzgerald and George Bulatowicz, an employee of the Department of Family Services that Margaret Moore had been sexually abused by Ken Curtis late in the year 1987. That the affiant made further in-

quiry into this matter and was informed that such sexual abuse had in fact occurred. Whereupon the affiant made request upon Shirley V. Tiernan, Social Worker III of the Missoula office of the Department of Family Services and was furnished with the report of the investigation into the matter of the sexual abuse of Margaret Moore by such department and that said report is annexed hereto in its entirety.

Signature: Ralph L. Herriott

Subscribed and sworn to before me this 23rd day of May, 1988.

Signature: M. E. Herriott

Notary Public for the State of Montana, Residing at Billings, Montana. My Commission expires 12-16-90.

(NOTARIAL SEAL)

{Attached next was letter dated February 29, 1988, from Shirley V. Tiernan, Social Worker III, Missoula DFS addressed to Ralph Herriott concerning the Curtis/Moore case, which letter may be found at App. 198 in the BRIEF OPPOSING MOTION TO DISMISS.}

{Attached next was the complete DFS developed file on the Curtis/Moore case sent to Ralph Herriott at his request acting for and in behalf of Appellant Frank Boring Fitzgerald. That DFS file can be found at App. 199-249.}

APPENDIX V (Typed Copy)

MONTANA 13TH JUDICIAL DISTRICT,
YELLOWSTONE COUNTY

FRANK B. FITZGERALD, Petitioner, vs. THE STATE OF MONTANA, acting by and through HAROLD HANSER, the County Attorney in and for Yellowstone County: DEPARTMENT OF FAMILY SERVICES, an agency of the State of Montana; and JOHN DOE I, JOHN DOE II, JOHN DOE III, and JOHN DOE IV, representatives and employees of the Department of Family Services of the State of Montana, and DAMON GANNETT, Guardian ad litem of Margaret Geraldine Moore, a minor child, Respondents	No. DV 88-727 {726} ORDER DENYING WRIT OF MANDATE

Petitioner seeks to have this court issue its Writ of Mandate to respondents ordering them to initiate such action or institute such proceedings as are appropriate and necessary to have Margaret Geraldine Moore adjudicated a youth in need of care, remove her from her present environment in the Curtis foster home and place her in a suitable environment, to-

wit: the home of Frank B. Fitzgerald, her father and petitioner.

There are a number of reasons why it is not proper to grant the writ. First, a writ of mandate only lies for acts specifically set out by statute. A person subject to writ of mandate must be able to read a statute and perceive a specific and clearly stated act or function he is to perform. In other words, a clear and direct mandate from the legislature. Those more nebulous and non-specific legislative directives that delegate discretionary powers are not subject to writ of mandate.

Petitioner cites M.C.A. 41-3-401 as the mandate he would have this court enforce but there is no legislative directive there specific enough to enforce by writ of mandate.

Second, part of what petitioner seeks has already been done: Margaret Geraldine Moore has already been adjudicated a youth in need of care in DJ-79-188. In fact the

Department of Family Services and its predecessors have been involved with this family since 1979 and petitioner and his current attorney, Ralph Herriott, have already been to the Supreme Court on this case in years past. In this Court's opinion, the appropriate place to bring petitioner's current concerns to light is within the context of that proceeding and not in a totally new action, especially where the new court is not advised of the previous eight years of interaction with the Department of Family Services.

Third, as pointed out in the Supreme Court opinion in DJ-79-188, without some showing of significantly changed circumstances, placement of the youth with petitioner would seem quite inappropriate. Without some explanation, this Court is surprised that petitioner would even suggest that placement with him might be appropriate.

Fourth, this Court is aware from the allegations contained in the petition and supporting affidavits that there is some good reason to be concerned that the Curtis foster home is an appropriate placement. However, the petition also reveals that the Department of Family Services and the guardian ad litem are also aware of the basis for petitioner's concern and are apparently addressing that problem in an appropriate manner. If petitioner disagrees, the correct proceedings for him to bring his concerns to be aired is the youth court proceedings already begun in 1979.

Wherefore, IT IS ORDERED that the petition for writ of mandate be and hereby is DENIED.

Dated this 10th day of JUNE, 1988.

Signature: G. TODD BAUGH, District Judge

cc: Ralph Herriott
Greg Mullowney
Department of Family Services
Damon L. Gannett
Hon. William J. Speare

CERTIFICATE OF SERVICE